No. 91-871

In the Supreme Court of the United States

OCTOBER TERM, 1991

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether, under the Longshore and Harbor Workers' Compensation Act, the amount of benefits payable to a retired claimant who suffered an employment-related hearing loss is calculated (a) under 33 U.S.C. 908(c)(13), which provides a scheduled award for loss of hearing; (b) under 33 U.S.C. 908(c)(23), which provides benefits when a worker's disability occurs after retirement; or (c) under a hybrid approach that uses parts of both 33 U.S.C. 908(c)(13) and 908(c)(23).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Ernest C. Brown is a respondent.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 942 F.2d 811. The decision and order of the Benefits Review Board (Pet. App. 21-30) and the decision and order of the administrative law judge (Pet. App. 31-47) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1991. The petition for a writ of certiorari was filed on November 25, 1991, and granted on March 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Longshore and Harbor Workers' Compensation Act and the Secretary of Labor's regulations are reprinted in pertinent part in the appendix to this brief.

STATEMENT

Respondent Ernest C. Brown, a former employee of petitioner Bath Iron Works, learned after he retired that he had suffered a work-related hearing loss. Pet. App. 9-10. All agree that Brown is entitled to benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA). The parties disagree as to how benefits for loss of hearing are calculated when a claim is brought by a retiree.

1. a. Until 1984, Section 8 of the LHWCA, 33 U.S.C. 908, provided only two different ways for calculating compensation for covered workers who sustained permanent partial disabilities. First, Section 8(c)(1)-(20), 33 U.S.C. 908(c)(1)-(20), lists certain body parts and functions, and provides that the loss of such a body part or function—including "loss of hearing," see Section 8(c)(13)—is automatically considered to be a permanent partial disability. A worker suffering one of these "scheduled" injuries is entitled under Section 8(c) to two-thirds of his or her average weekly wage for a specified number of weeks (ranging up to 312) depending on the type of injury. 33 U.S.C. 908(c)(1)-(18). If a worker suffers a partial loss of a body part or function listed on the schedule, the compensation period is reduced proportionately. 33 U.S.C. 908(c)(19).[1] A covered

[1] For example, because a complete loss of hearing in both ears (a binaural hearing loss) entitles a claimant to 200 weeks of compensation under Section 8(c)(13)(B), a claimant who suffers a 50% binaural hearing loss is entitled to 100 weeks of compensation.

employee with a "scheduled" injury is entitled to compensation at the specified amount "regardless of whether [the employee's] earning capacity has actually been impaired." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 269 (1980).

The second method for calculating compensation is set out in Section 8(c)(21). That Section does not establish fixed presumptions concerning lost earning capacity, and instead requires proof of actual impairment. It provides that covered workers with injuries that are not listed in the schedule are entitled to two-thirds of the difference between the worker's average weekly wage before the injury and the worker's residual earning capacity. Benefits are available for as long as the worker is impaired. 33 U.S.C. 908(c)(21).

Prior to the 1984 amendments, the Act did not specifically address a retired worker's entitlement to benefits for latent occupational diseases (such as asbestosis) that did not become manifest until after the worker's retirement. The Act defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10) (1982). Relying on this definition, the Benefits Review Board held in several cases that a claimant who voluntarily retired before the appearance of asbestosis (which is not a scheduled injury) was not entitled to any compensation because he could not establish that his injury caused any loss of earn-

ing capacity.[2] *Aduddell* v. *Owens-Corning Fiberglass*, 16 Ben. Rev. Bd. Serv. (MB) 131, 133 (1984). Accord *Worrell* v. *Newport News Shipbuilding & Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. (MB) 216 (ALJ) (1983); see also *Newport News Shipbuilding & Dry Dock* v. *Director, OWCP*, 681 F.2d 938, 942 (4th Cir. 1982). A sharply divided Board extended the holding of *Aduddell* to a claim for hearing loss, which is a scheduled injury, in *Redick* v. *Bethlehem Steel Corp.*, 16 Ben. Rev. Bd. Serv. (MB) 155 (1984). The Board held in *Redick* that a worker who learned of his employment-related hearing loss six months after he retired was not entitled to benefits because he could not show that the injury impaired his earning capacity.

b. In 1984, Congress reacted to the inequity it perceived in the Board's treatment of retirees in the *Aduddell* line of cases by amending the Act to create a third system of compensation covering retirees suffering from diseases with long latency periods. As amended, Section 10(i), 33 U.S.C. 910(i), defines the "time of injury" for a claim involving a disease "which does not immediately result in death or disability" as "the date on which the employee or claimant becomes aware [or should have become aware] * * * of the relationship between the employment, the disease, and the death or disability." 33 U.S.C. 910(i). If the "time of injury" under Section 10(i) is during the first year of the worker's retirement, the average earnings during the worker's final year of work are used to calculate the applicable average

[2] The Benefits Review Board was created by Section 21(b) of the LHWCA, 33 U.S.C. 921(b), to "hear and determine appeals * * * with respect to claims of employees under this [Act]." 33 U.S.C. 921(b)(3).

weekly wage. 33 U.S.C. 910(d)(2)(A). If the "time of injury" is after the worker's first year of retirement, then the national average weekly wage at that time applies. 33 U.S.C. 910(d)(2)(B). In either case, benefits are calculated by multiplying two-thirds of the appropriate average weekly wage by the claimant's percentage of permanent impairment as determined under the *Guides to the Evaluation of Permanent Impairment* (rev. 3d ed. 1990), which is published by the American Medical Association. 33 U.S.C. 908(c)(23). The claimant is entitled to benefits for the duration of the impairment. *Ibid.*

Thus, benefits for retirees with long-latency diseases differ from scheduled benefits in three ways. First, such benefits are paid weekly for as long as the worker is impaired, rather than for a set number of weeks as with a scheduled injury. Second, an award to a retiree on account of a disease that did not immediately result in death or disability is based on the impairment of the "whole person" under the AMA *Guides*, while a scheduled award is based on the degree of loss to the scheduled body part or function. For instance, a 100% hearing loss represents a 35% impairment of the worker under the AMA *Guides*. See Pet. App. 10. Third, the national average weekly wage is used when a latent disease manifests itself more than one year after the worker retires, while the worker's average weekly wage at the time of injury is always used in the case of a scheduled award.[3]

[3] Thus, under the schedule, the claimant in this case, Ernest C. Brown, would be entitled to two-thirds of his average weekly wage during the last year that he worked for the number of weeks prescribed in Section 8(c). Section 8(c)(13)(B) provides for 200 weeks of recovery in the case of a binaural hearing loss; under Section 8(c)(19), that period

The 1984 amendments did not change the basic scheme for compensating claims for scheduled or unscheduled benefits in cases where the injury occurs before retirement. The amendments, however, did specifically address hearing-loss claims. The schedule was amended to provide that the time for filing a notice of injury, and the time for filing a claim, do not begin to run "until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." 33 U.S.C. 908(c)(13)(D). Thus, under Section 8(c)(13)(D), a worker who suffers a hearing loss, but does not know from an audiogram that his or her hearing has been impaired, is not barred from filing a claim. See 20 C.F.R. 702.221(b).[4]

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would be reduced because Brown sustained an 82.4% hearing loss rather than a total hearing loss, so he would receive two-thirds of his 1972 average weekly wage for approximately 165 weeks (200 weeks times .824). Under the provision applicable to latent diseases that produce disability after retirement, on the other hand, Brown would receive 29% of two-thirds of the national average weekly wage in 1985 for as long as he was impaired, because an 82.4% hearing loss translates into a 29% impairment of the "whole person" under the AMA *Guides*. See Pet. App. 23.

[4] The 1984 amendments also extended the time limits for giving notice to the appropriate deputy commissioner and to the employer of "an occupational disease which does not immediately result in a death or disability" to one year, and for filing a claim with respect to such a disease to two years. 33 U.S.C. 912(a), 913(b)(2). However, since hearing loss is not an "occupational disease which does not immediately result in a death or disability," the normal 30-day time period for giving notice and the one-year time period for filing claims apply in hearing loss cases, although those periods do not begin to run until the claimant receives an audiogram and an accompanying report. See 33 U.S.C. 912(a), 913(a); 20 C.F.R. 702.212(a).

2. Ernest C. Brown, the claimant in this case, worked for Bath Iron Works as a riveter and a chipper from 1939 until 1947, and again from 1950 until his retirement in 1972. Pet. App. 22. In 1985, after being informed that a 1983 hearing test indicated an employment-related 82.4% binaural hearing loss, Brown applied for longshore benefits. Pet. App. 9.[5] The administrative law judge found that Brown's "hearing loss resulted, in part, from * * * acoustic trauma experienced while * * * employed at the Bath Iron Works shipyard and thus his hearing loss arose out of and in the course of his employment in Bath Iron Works." Pet. App. 39.[6]

In calculating benefits, the ALJ applied the "hybrid" approach previously adopted by the Benefits Review Board. Applying Section 10(i), the ALJ concluded that the "time of injury" for purposes of determining Brown's average weekly wage was September 6, 1985, when Brown received the results of the audiogram. Pet. App. 40. The ALJ accordingly used the national average weekly wage on September 6, 1985, as provided in Section 10(d)(2)(B), which applies in cases where a latent disease produces disability after retirement, rather than Brown's average

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[5] Brown relied on the tolling provision for scheduled hearing losses in Section 8(c)(13)(D) to overcome the 13-year gap between the time he retired and the time he filed his claim. The administrative law judge held that Brown's "claim is not time barred" because Brown did not receive an audiogram and accompanying report until 1985. Pet. App. 36. Petitioners do not challenge that conclusion.

[6] The ALJ also determined that, under established precedent, Brown was entitled to compensation for the full extent of his hearing loss even though this loss was not caused exclusively by noise exposure in his employment. Pet. App. 38-39.

weekly wage before he retired, as provided in the schedule. Pet. App. 37-38. However, rather than awarding benefits for the duration of the disability, as set forth in Section 8(c)(23) (which applies to claims where a latent disease produces disability after retirement), the ALJ limited the award to a total of 165 weeks under Section 8(c)(13), the hearing loss provision in the schedule. Furthermore, the ALJ did not convert Brown's 82.4% hearing loss into a percentage of whole person impairment under the AMA *Guides*, as required by the provisions governing cases where a latent disease produces disability after the claimant retires. Pet. App. 45-46. In short, the ALJ, following Board precedent requiring the use of a hybrid approach, used a calculation method that combined portions of the schedule and portions of the provisions governing cases where a latent disease produces disability after a claimant retires.[7]

The Board upheld the ALJ's determinations. Relying on its prior decision in *Machado* v. *General Dynamics Corp.*, 22 Ben. Rev. Bd. Serv. (MB) 176 (1989) (en banc), and the Fifth Circuit's decision in *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 898 F.2d 1088 (1990), the Board held that the ALJ properly determined that the "time of injury" under Section 10(i) occurred in 1985, when Brown received the results of the audiogram, and therefore correctly used the national average weekly wage at that time, as provided by Sections 8(c)(23) and 10(d)(2). Pet. App. 24. However, the Board disagreed with the Fifth Circuit's holding in *Ingalls Shipbuilding*, which was that benefits must be calculated entirely under the rules governing latent diseases that produce disability after retirement. The Board instead adhered to the hybrid approach it adopted in *Machado*. Furthermore, noting that benefits are typically less generous under the provisions governing latent diseases than under the schedule, the Board concluded that it would be unfair to treat retirees with hearing losses less favorably than claimants who were still working. *Id.* at 23-26.[8]

3. The First Circuit affirmed for the reasons advanced by the Director of the Office of Workers' Compensation Programs. Thus, it held that the "time of injury" in a hearing loss case is when the claimant's hearing was impaired and that benefits in a hearing-loss case must be calcluated under the schedule. The court of appeals rejected the Board's hybrid approach and the approach adopted by the Fifth Circuit in

[7] The ALJ also determined that Bath Iron Works was entitled to have its liability limited under Section 8(f) of the Act, 33 U.S.C. 908(f), because Brown had a preexisting hearing loss that was aggravated by his work at Bath Iron Works. Specifically, the ALJ held that the "special fund" created by 33 U.S.C. 944 was liable for 81.2 weeks of payments based on the 40.6% hearing loss that Brown suffered by 1954, while Bath Iron Works was responsible for the remaining 83.6 weeks based on a 41.8% hearing loss suffered after 1954. Pet. App. 42-43. The Section 8(f) issue is not before the Court.

[8] Two of the Board's five members wrote separate opinions arguing that the Board had incorrectly decided *Machado*, and that benefits should be calculated under Section 8(c)(23), as the Fifth Circuit concluded in *Ingalls Shipbuilding*, rather than under the Board's hybrid approach. One of those Board members dissented on these grounds (McGranery, J., Pet. App. 29-30), but the other (Stage, C.J., Pet. App. 27-28) concurred on the ground that the Board should adhere to its precedent since the First Circuit had not yet ruled on the issue. A third Board member (Brown, J., Pet. App. 28-29) agreed with the Board's hybrid approach, but dissented because of his view that Bath Iron Works should not obtain relief under Section 8(f), but should be liable for the full amount of Brown's award.

Ingalls Shipbuilding, both of which are based on the premise that the "time of injury" in a hearing loss case is not the time at which the hearing loss occurs. Pet. App. 14.

In the First Circuit's view, the key question for determining which approach applies is whether the occupational hearing loss occurred before or after retirement.[9] In this regard, the court agreed with the Director that occupational hearing loss is an injury, unlike diseases such as asbestosis, that "a worker typically suffers *before* retirement." Pet. App. 12. Similarly, the court accepted the fact that occupational hearing loss has no latency period, but rather develops simultaneously with exposure to excessive noise. *Id.* at 13. Accordingly, the court concluded that the "language applicable to System Three [the provisions governing latent diseases that produce disability after retirement] makes clear that that System does not apply at all" to hearing loss cases, since those provisions apply only when the disability occurs *after* retirement. *Id.* at 12. Rather, the statute "mandate[s] compensation according to System One [the schedule]" in cases where the injury occurred before retirement. *Ibid.*

The court emphasized the long-settled principle that "the statute *presumes* that a worker who suffers a scheduled injury suffers an 'incapacity because of injury to earn' prior wages." Pet. App. 16, citing *Travelers Ins. Co.* v. *Cardillo*, 225 F.2d 137, 144 (2d Cir.), cert. denied, 350 U.S. 913 (1955); see also

[9] For analytical purposes, the court designated "scheduled injuries" (in Section 8(c)(1)-(20), 33 U.S.C. 908(c)(1)-(20)) as "System One"; "unscheduled injuries" (in Section 8(c)(21), 33 U.S.C. 908(c)(21)) as "System Two"; and "injuries suffered by retired workers" (in Sections 2(10), 8(c)(23), 10(d), and 10(i), 33 U.S.C. 902(10), 908(c)(23), 910(d), 910(i)) as "System Three." See Pet. App. 2-4.

Potomac Elec. Power Co., 449 U.S. at 269 (a worker with a scheduled injury is entitled to benefits "regardless of whether his earning capacity has actually been impaired"). The court therefore rejected the Board's reasoning in *Redick* that the schedule does not govern a post-retirement hearing-loss claim because the claimant has not suffered a loss of wage-earning capacity. Rather, it concluded that *Redick* was either wrongly decided or distinguishable because it may have involved a special case of latent hearing loss. Pet. App. 15-16.

Similarly, the court rejected the argument—based on a comment by Senator Hatch, a sponsor of the 1984 amendments, listing *Redick* as one of several cases that "did not represent equitable policy," 130 Cong. Rec. 26,300 (1984)—that Congress intended the new provisions governing latent disease to govern hearing-loss cases. Pet. App. 17. The court observed that "insofar as [*Redick*] dealt with typical hearing loss * * *, it could be corrected judicially and did not necessarily require special legislation." *Ibid.* The court also noted that "the legislative debates primarily concerned 'long-latency diseases,' such as asbestosis, not hearing loss, and there is no good reason for thinking that Senator Hatch, in his effort to correct unfairness, did want, or would have wanted, the law to treat 'hearing loss' cases less generously than it would have done without the amendments." *Ibid.*

The court explicitly disagreed, Pet. App. 18, with the Fifth Circuit's decision in *Ingalls Shipbuilding*. In *Ingalls*, the Fifth Circuit acknowledged, but found irrelevant, that hearing loss differs from asbestosis in that the full extent of the injury from occupational hearing loss precedes the worker's retirement. 898 F.2d at 1093. Relying on Senator Hatch's statement, the *Ingalls* court concluded that, although "the Direc-

tor's reading * * * is arguable, * * * the legislative history indicates that Congress created a single scheme for *retirees* regardless of the nature of their occupational disease." *Id.* at 1094. The First Circuit, however, concluded that the statutory language clearly "treats a hearing loss case differently than an asbestosis case for the very reason that the Fifth Circuit found irrelevant," *i.e.*, because "the 'time of injury' in the first case, but not the second case, is prior to retirement." Pet. App. 18.[10]

Although the court also disagreed with the Board's hybrid approach, the court affirmed the Board's judgment. The court explained that neither Bath Iron Works nor the Director had asked the court of appeals to recalculate the award, and Brown profited since the error resulted in a higher payment, so it "consider[ed] the issue waived." Pet. App. 19-20. Petitioners do not separately challenge the ruling on this point.

SUMMARY OF ARGUMENT

1. The First Circuit correctly concluded that the benefits payable to respondent Brown, a retired maritime worker who suffered an employment-related hearing loss, must be calculated under the provisions governing scheduled injuries. The schedule specifically provides a fixed award for hearing loss in Section 8(c)(13). Further, the language of the Act makes no distinction between retirees and current employees who suffer scheduled injuries—both groups are entitled to compensation in the amounts fixed by the schedule. Section 8(c)(13)(D), which Congress added in 1984 to extend the time within which to bring hearing loss claims under the schedule, confirms that occupational hearing loss is to be compensated under the schedule.

The First Circuit correctly rejected the Fifth Circuit's approach, adopted in *Ingalls Shipbuilding*, under which retirees' hearing loss awards are calculated under Section 8(c)(23) and the other provisions adopted in 1984 to govern cases involving latent diseases that do not produce disability until after a worker retires. Section 10(i) makes clear that those provisions apply only where injury was "due to an occupational disease which does not immediately result in death or disability." 33 U.S.C. 910(i). The scientific literature compels the conclusion—which is, in any event, undisputed—that occupational hearing loss is not such a disease. Rather, unlike asbestosis, which develops following a latency period, occupational hearing loss occurs at the time that a worker is exposed to excessive noise, and does not progress thereafter.

The First Circuit also correctly rejected the hybrid approach adopted by the Benefits Review Board. There is simply no statutory basis for picking and choosing from among the various components of the formulae set out in the statute governing different types of awards.

2. Resort to legislative history is unnecessary in this case. That history, nevertheless, does not contradict the statutory language indicating that the special

[10] For similar reasons, the court distinguished two cases holding that "time of injury" is the date when a disease manifests itself, rather than the date of last exposure to what caused the injury. *Castorina* v. *Lykes Bros. S.S Co.*, 758 F.2d 1025, 1031 (5th Cir.), cert. denied, 474 U.S. 846 (1985); *Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280, 1289-1291 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984). Those cases, the court explained, involved asbestosis claims where the disabling symptoms first appeared *after* retirement, and were thus "inapplicable here, where hearing loss is fixed forever before retirement." Pet. App. 19.

rules governing latent diseases do not govern hearing loss claims brought by retirees. With the exception of one comment by a senator describing as inequitable the Board's *Redick* decision (the decision holding that retirees may not obtain compensation for hearing loss), the legislative history focuses solely on progressive diseases such as asbestosis. The congressional reports thus confirm the conclusion that the special rules adopted in 1984 (other than the rule extending the time within which to obtain compensation for hearing loss under the schedule) were only intended to govern claims based on diseases that do "not immediately result in death or disability," as Section 10(i) clearly states.

3. The interpretation of the Director of the Office of Workers' Compensation Programs, who is charged with administering the LHWCA, is reasonable and entitled to deference. Shortly after the Act was amended, the Director promulgated a regulation, 20 C.F.R. 702.212, specifying when notice of an injury is due under the LHWCA. The regulation treats occupational hearing loss like other claims governed by the schedule, and provides that occupational hearing loss is not subject to the special rules applicable to "occupational disease which does not immediately result in death or disability." Although we believe that conclusion is plainly mandated by the statute, any ambiguity should be resolved in favor of the Director's reasonable interpretation.

ARGUMENT

THE AMOUNT OF BENEFITS PAYABLE TO A RETIRED CLAIMANT WHO SUFFERED AN EMPLOYMENT-RELATED HEARING LOSS IS CALCULATED UNDER THE SCHEDULE SET OUT IN SECTION 8(c)(13) OF THE LHWCA

The court of appeals correctly held that the LHWCA mandates that respondent Brown's compensation for hearing loss be calculated under the terms of the schedule set forth in Section 8(c)(13). As the court of appeals determined, this interpretation is compelled by the plain language of the Act, and does not conflict with the legislative history. Even if the statutory terms were "replete with ambiguity," as petitioners contend, Br. 16, the Director's reasonable interpretation of the statutory provisions is entitled to deference.[11]

A. The Language Of The Statute Compels The Conclusion That Hearing Loss Awards Are Calculated Under The Schedule

1. The schedule set out in Section 8(c) of the LHWCA provides a formula for calculating benefits

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[11] As in any case involving statutory interpretation, the "starting point must be the language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). If the statute is clear and unambiguous, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). If the statute is silent or ambiguous on the question, the court then must determine whether the agency's construction is a "permissible" one. *K Mart*, 486 U.S. 291-292; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In such a case, the court must defer to the agency's interpretation so long as it is reasonable and consistent with the statutory purposes. *K Mart*, 486 U.S. at 292.

for a variety of occupational injuries, including "loss of hearing," which is listed in Section 8(c)(13). There is no question that if Brown were still working, his hearing loss would be compensable under that schedule. The fact that Brown has retired is simply of no consequence under the statutory scheme.

It has long been settled that a worker who suffers a "permanent disability," such as the loss of a limb or the loss of hearing, is conclusively presumed to have suffered an incapacity to earn wages and is entitled to the benefits listed in the schedule regardless of whether he continues to work. Pet. App 16. As this Court has recognized, "the injured employee is entitled to receive two-thirds of his average weekly wages for a specific number of weeks, regardless of whether his earning capacity has actually been impaired." *Potomac Elec. Power Co.*, 449 U.S. at 269. As the First Circuit recognized, the Board's decision in *Redick* was therefore "simply wrong" if it was based on the assumption that a retired worker cannot obtain compensation under the schedule for a work-related injury because a retiree cannot establish an "incapacity" to earn wages. Pet. App. 16.

While the loss of an arm or a leg is always immediately obvious, Congress has recognized that loss of hearing is not. Accordingly, Congress in 1984 amended the schedule to provide a special rule for hearing loss cases, under which "[t]he time for filing a notice of injury * * * or a claim for compensation * * * shall not begin to run in connection with any claim for loss of hearing * * * until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." 13 U.S.C. 908(c)(13)(D). The 30-day time period for giving notice to the employer and the one-year time limit for

filing a claim, which govern all claims under the schedule, therefore pose no unfair bar to hearing loss claims.[12]

In short, the schedule specifically deals with hearing loss claims. And as the First Circuit recognized, the fact that hearing loss is often overlooked for a period of time after it occurs presents no substantive or procedural bar to recovery by retirees who have suffered a work-related hearing loss.

2 Petitioners argue that the First Circuit erred, while the Fifth Circuit was correct in concluding in *Ingalls Shipbuilding*, 898 F.2d at 1096, that Section 8(c)(23) and the other provisions relating to latent diseases that produce injury after retirement govern the calculation of benefits in cases involving claims for hearing-loss benefits brought by retirees. Under petitioners' approach, Brown would receive less compensation, because an award under Section 8(c)(23) would be based on the percentage of impairment of the "whole person," rather than the percentage of impairment of hearing. See note 3, *supra*.

a. Petitioners stress that Section 8(c)(23) applies "*notwithstanding*" Section 8(c)(13). Br. 7. But

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[12] In *Alabama Dry Dock & Shipbuilding Corp.* v. *Sowell*, 933 F.2d 1561, 1567 (11th Cir. 1991), the court was troubled because "[i]f the Director is correct, the statute appears silent on the time of injury for compensation of hearing loss and any other occupational disease which *does* immediately cause death or disability." The court rejected the Director's argument that "the date of last exposure," that is, "the date on which the disabling condition is complete," sets the "time of injury." *Ibid.* But since occupational hearing loss occurs simultaneously with exposure to excessive noise and does not progress following removal from the noisy environment, see *id.* at 1566, Pet. App. 12, the date of last exposure is the relevant "time of injury," just as the date on which a worker loses a finger is the "time of injury" for that sort of scheduled disability.

Section 8(c)(23) applies only "to a claim * * * for which the average weekly wages are determined under section 910(d)(2)." 33 U.S.C. 908(c)(23). Section 10(d)(2) in turn provides a method for calculating average weekly wages for

> disability due to an occupational disease for which the time of injury (as determined under subsection (i) * * * occurs—
>
> > (A) within the first year after the employee has retired, * * * or
> >
> > (B) more than one year after the employee has retired * * *.

Section 10(i), the subsection referenced in Section 10(d)(2), provides a method of determining the time of injury for "disability due to an occupational disease which does not immediately result in death or disability." 33 U.S.C. 910(i). Thus, Section 8(c)(23) and the provisions it references govern only latent diseases that produce disability after retirement. They do not apply to cases involving an occupational disease that immediately results in death or disability. In short, as the First Circuit stated, while the statute "seems complex * * *, it basically says something that is fairly simple: When the 'time of injury' occurs before retirement, the Labor Department should calculate compensation under either System One (if the injury is scheduled) or System Two (if the injury is not scheduled)." Pet. App. 7. Section 8(c)(23), on the other hand, applies only "[w]hen the 'time of injury' occurs after retirement." Pet. App. 7-8.

Since the "time of injury" is critical in determining which statutory provision governs, to prevail petitioners must show that hearing loss is a disability

that can occur after retirement. But petitioners make no claim that hearing loss does not result in immediate disability. To the contrary, they admit that "occupational loss of hearing *is* immediate because it does not progress following exposure to noise." Br. 8. Similarly, in *Ingalls Shipbuilding*, the case on which petitioners rely, the Fifth Circuit recognized "that hearing loss does not progress after retirement." 898 F.2d at 1093.[13] Thus, it is undisputed that Brown had incurred the full extent of his occupational hearing loss before he retired. That conclusion is compelled by the relevant scientific literature, which shows that, unlike asbestosis, occupational hearing loss has no latency period. See R. Sataloff & J. Sataloff, *Occupational Hearing Loss* 357 (1987); see also Pet. App. 12.[14]

The First Circuit correctly concluded that, while the LHWCA seems complex, "its language treats a hearing loss case differently than an asbestosis case

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[13] The Eleventh Circuit, on which petitioners also rely, likewise recognized that "occupational hearing loss does not get worse once the employee leaves the employment." *Alabama Dry Dock & Shipbuilding Corp.*, 933 F.2d at 1566.

[14] The disease—in medical terms, sensorineural hearing loss due to cumulative acoustic trauma; in statutory terms, "loss of hearing" "aris[ing] naturally out of [the] employment," Sections 8(c)(13), 2(2)—is partiy dose-related, sometimes imperceptible at onset, and often worsens with additional exposure to excessive noise. 33 U.S.C. 908(c)(13), 902(2). But unlike asbestos-related lung conditions, which continue to progress once set in motion by inhalation of asbestos, hearing loss has no "latency period," *i.e.*, no delay between the injurious exposure and the appearance of the harm resulting from it. Hearing loss due to cumulative acoustic trauma occurs contemporaneously with the noise exposure that causes it, and does not progress after removal from the injurious noise. R. Sataloff & J. Sataloff, *supra*, at 357.

for the very reason that the Fifth Circuit found irrelevant." Pet. App. 18. "Using ordinary English," the First Circuit logically concluded "that a worker who becomes deaf before retirement is a worker wh[o] disability 'occurs' *before* retirement, not after retirement," and that because "deafness is a disease that causes its symptoms * * * simultaneously with its occurrence," it cannot qualify as an occupational disease "which does not immediately result in death or disability." *Id.* at 13. Thus, the court below correctly rejected petitioners' contention that Section 8(c)(23) and the other provisions governing latent diseases apply in this case.

b. Contrary to petitioners' contention, Br. 11-12, that conclusion is unaffected by the fact that a claimant like Brown may be entitled to compensation for his entire hearing loss, including age-related hearing loss (presbycusis) that progresses after retirement, where the employer cannot demonstrate what portion of the hearing loss was due to occupational exposure. An award under the LHWCA must be based on an occupational injury. In this case, it is undisputed that Brown suffered an occupational hearing loss due to exposure to excessive noise at Bath Iron Works, Pet. App. 39, and that is the basis for the award. Because occupational hearing loss does not progress after exposure to excessive noise ends, Brown's occupational hearing loss cannot be said to have developed after retirement.

The fact that Brown may not have become aware of his occupational hearing loss until presbycusis further worsened his condition does not negate the fact that he had previously suffered a loss made compensable by the Act. In short, petitioners' assertion that Brown's presbycusis progressed after retirement is irrelevant to determining when the occupational

hearing loss occurred and which statutory provision applies.

The equities asserted by petitioners provide no basis for implying an exception into the statutory scheme. Moreover, employers can protect against any perceived unfairness resulting from this scheme by providing an audiogram at the time of retirement, thereby "freezing" the amount of compensable hearing loss at that point in time. Cf. *Port of Portland* v. *Director, OWCP*, 932 F.2d 836, 840-841 (9th Cir. 1991) (employer not liable for hearing loss for which there is no possible rational connection with employment).

3. The hybrid approach employed by the Board in this case finds even less support in the language of the statute than petitioners' interpretation. That approach will often yield the most generous award to retired claimants, as in this case, Pet. App. 19-20, because it utilizes a recent national average weekly wage, instead of actual wages from prior years (as provided under Section 8(c)(23)), but the award is not reduced to reflect the loss to the "whole person," as required by the provisions governing awards for latent diseases that produce disability after retirement. Respondent Brown accordingly supports the approach employed by the Board in this case.[15]

There is no statutory basis whatsoever for the hybrid approach. Section 8(c) sets out a general formula for use in calculating benefits under the schedule, and Section 8(c)(13) specifically provides for scheduled benefits for loss of hearing. Section 8(c)(23) sets

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[15] Even though the court of appeals affirmed the Board's judgment rather than remanding for a reduction in benefits to the amount provided under the schedule because petitioners had waived the issue, see Pet. App. 19-20, Brown fears that petitioners may seek to recoup the overpayment.

out a different formula that applies in latent disease cases where the disability arises after the claimant retires. The Board was not free to creatively combine elements from various parts of the LHWCA in order to maximize the amount of the award. Partially recognizing its error, the Board has recently abandoned the hybrid approach and adopted the Fifth Circuit's approach. *Harms* v. *Stevedoring Services of America*, No. 89-1344 (Ben. Rev. Bd. Apr. 29, 1992).[16]

B. The Legislative History Supports The Conclusion That Hearing Loss Is Compensated Under The Schedule

Petitioners recognize that this Court may decide this case by looking "no farther than the words 'occupational disease which does not immediately result in disability or death'" in Section 10(i). Br. 16. But they contend that "ambiguities make it impossible to follow the admonition that, in construing the LHWCA, 'the wisest course is to adhere closely to what Congress has written.'" *Ibid.*, quoting *Washington Metro. Area Transit Auth.* v. *Johnson*, 467 U.S. 925 (1984). Petitioners instead urge this Court to turn to the legislative history.

[16] The Board stated, with respect to the First Circuit's decision in this case, that "we differ from the conclusion in *Bath Iron* that hearing loss should be distinguished from other occupational diseases because symptoms arise during employment." Slip op. 7. In the Board's view, "there is no evidence that Congress intended such a distinction by using the phrase 'occupational disease which does not immediately result in death or disability.'" *Ibid.* But the language Congress adopted says that occupational diseases that do not immediately result in disability are to be treated differently from occupational hearing loss, which produces immediate disability and is compensable under the schedule.

Resort to that history is unnecessary, and therefore inappropriate. It nevertheless does not support petitioners' claims. Petitioners rely primarily on a reference by Senator Hatch to *Redick*, the Board decision that held that a retiree may not obtain benefits for hearing loss. Specifically, after describing *Aduddell*, the asbestosis case where the Board held that the claimant was not entitled to benefits because he could not show a loss of earning capacity, Senator Hatch said that "[a]n identical result was reached in *Redick* v. *Bethlehem Steel Corporation*, 16 BRBS 155 (Mar. 20, 1984)." 130 Cong. Rec. 26,300 (1984). Senator Hatch subsequently stated that "these interpretations of the Longshore Act did not represent equitable policy." *Ibid.* From this reference to *Redick*, petitioners argue that Section 8(c)(23) should be applied to hearing loss cases even though, under Section 10(i), the provision applies only in cases involving "occupational disease which does not immediately result in death or disability" and hearing loss is not such a disease.

As the court of appeals stated, petitioners "seek[] to prove far too much on the basis of far too little." Pet. App. 17. For one thing, apart from Senator Hatch's single passing reference to *Redick*, the legislative history to the 1984 amendments focused exclusively on diseases such as asbestosis and silicosis, which, because of long latency periods, can actually develop and progress after retirement.[17] Further-

[17] For example, Representative Miller twice mentioned the Board's asbestosis decision in *Aduddell*, without mentioning *Redick*. 130 Cong. Rec. 25,902-25,903 (1984). Similarly, the conference report mentions *Aduddell* without mentioning *Redick*. H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 30 (1984).

more, as the court below observed, Senator Hatch's criticism of *Redick* could be read as a suggestion that the Board misconstrued the pre-amendment statute, so that judicial overruling would suffice to correct the erroneous decision.[18]

Petitioners also rely, Br. 16-18, on references in the legislative history that show Congress's concern with the date on which the occupational disease "manifests" itself. But there is no apparent relevance of this history to compensation for hearing loss, which is a scheduled disability and not an "occupational disease which does not immediately result in death or disability." 33 U.S.C. 910(i). While Section 10(i) defines "time of injury" as the date on which the "claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability," it does so only for such an occupational disease. Petitioners' argument would essentially deny any meaning to the limiting phrase "not immediately result[ing] in death or disability." [19]

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[18] Moreover, Senator Hatch did not point out that *Redick* was a hearing loss case. Even a congressman who paid close attention to Senator Hatch's floor remarks probably would have thought that *Redick* was an asbestosis case, since Senator Hatch first explained that *Aduddell* was an asbestosis case, next stated that "[a]n identical result was reached" in *Redick*, 130 Cong. Rec. 26,300 (1984), and then noted that in *Worrell* an ALJ applied *Aduddell* to deny benefits where the claimant's decedent developed mesothelioma after retirement as a result of exposure to asbestos.

[19] As already noted, Congress responded to the problem presented by the fact that hearing loss is sometimes not noticed for a period of time by adding Section 8(c)(13)(D) to the schedule in 1984, so that the time to give notice and file a claim for hearing loss does not begin to run until the worker receives an audiogram and an accompanying report showing a hearing loss.

The legislative history supports a straightforward reading of the 1984 amendments. As noted, other than the passing reference to *Redick*, the history focused exclusively on diseases like asbestosis that have a long latency period. The House Report accompanying the 1984 amendments described diseases that do "not immediately result in death or disability" as "disabling conditions which do not develop immediately after the initial change in the body of the worker resulting from the exposure to a toxic substance or harmful physical agent, or which do not even result in a change in the body immediately after the exposure to the causative toxic substance or harmful physical agent." H.R. Rep. No. 570, 98th Cong., 1st Sess. 11 (1984). This statement reinforces what the language of the amendments plainly provides: a disease "not immediately result[ing] in * * * disability" is one that does not immediately result in disabling symptoms or physical changes. Petitioners agree, as the court of appeals recognized, that occupational hearing loss "is a disease that causes its symptoms, namely loss of hearing, simultaneously with its occurrence." Pet. App. 13. And under Section 8(c)(13), those symptoms constitute a disability as soon as they arise. Therefore, the legislative history amply supports the First Circuit's conclusion that occupational hearing loss is not the type of disease Congress meant to cover in Section 8(c)(23) and related provisions.

C. The Interpretation Of The LHWCA Provided By The Director Of The Office Of Workers' Compensation Programs Is Entitled To Deference

Congress has provided that the Secretary of Labor "shall administer" the LHWCA, and she has express authority "to make such rules and regulations * * * as may be necessary in the administration" of the Act. 33 U.S.C. 939(a). The Secretary has delegated her authority to administer the LHWCA to the Director of the Office of Workers' Compensation Programs. 20 C.F.R. 701.202. Accordingly, his statutory analysis is entitled to deference under the principles enunciated by this Court in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See, *e.g.*, *Force* v. *Director, OWCP*, 938 F.2d 981, 983 (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co.* v. *Howard*, 904 F.2d 206, 208-209 (4th Cir. 1990); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983).[20] The views of the Benefits Review Board, on the other hand, are not entitled to deference because the Board is not charged with administering the Act.

[20] Not all courts of appeals have afforded deference to the Director. See *Director, OWCP* v. *General Dynamics Corp. (Krotsis)*, 900 F.2d 506, 510 (2d Cir. 1990); *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 287-288 (6th Cir. 1988); *Director, OWCP* v. *O'Keefe*, 545 F.2d 337, 343 (3d Cir. 1976). These cases are based on the erroneous premise that "neither the Director nor the Board is the officer or agency charged with the administration of the [LHWCA]." 545 F.2d at 343. To the contrary, the Director administers the LHWCA to the same extent as he administers the Black Lung Benefits Act, see *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159 (1987), and in the same sense as the Secretary of Labor administers the Occupational Safety and Health Act, see *Martin* v. *OSHRC*, 111 S. Ct. 1171 (1991).

Potomac Elec. Power Co., 449 U.S. at 278 n.18. Accordingly, even if the interpretation urged by the Director in this case were not compelled by the language of the statute, that interpretation nevertheless would be entitled to deference because it represents a longstanding, consistent, and reasonable construction of the Act.

The Director promulgated a regulation in 1985 that clearly expressed his view that hearing loss is not subject to Section 8(c)(23) and the other provisions governing latent diseases that develop after retirement. Specifically, 20 C.F.R. 702.212(a)(2) requires that a hearing-loss claimant give notice of injury within 30 days of the date of injury (specially defined for this purpose as the date on which the claimant receives an audiogram and report), rather than within one year of the date of awareness as required (see 20 C.F.R. 702.212(b)) for occupational diseases that "do not immediately result in death or disability." The Director explained that a hearing-loss claimant is not subject "to the extended time requirements applicable to occupational diseases that do not immediately result in disability or death, since a hearing loss could entitle an employee immediately to a schedule award of compensation." 50 Fed. Reg. 389 (1985).[21] The regulation shows that the Director has consistently interpreted the statute such that hearing loss claims are to be brought under the provisions of the schedule, and not under the special rules applicable to latent diseases that produce disability after retirement.

[21] Thus, petitioners are wrong to imply, Br. 9 n.4, that the Director's interpretation is only a litigating position unworthy of deference. But see *Martin*, 111 S. Ct. at 1179 (litigating position is owed deference when it is not a mere post hoc rationalization).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Section 2(10) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(10), provides:

> (10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2).

Section 8(c)(13), 33 U.S.C. 908(c)(13), provides, in pertinent part:

> (c) Permanent partial disability: In the case of disability partial in character but permanent in quality the compensation shall be 66-2/3 per centum of the average weekly wages, * * * and shall be paid to the employee, as follows:
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> * * * * *
>
> (13) Loss of hearing:
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> (A) Compensation for loss of hearing in one ear, fifty-two weeks.
>
> (B) Compensation for loss of hearing in both ears, two-hundred weeks.
>
> (C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a li-

censed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time that it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 12 of this Act, or a claim for compensation, under section 13 of this Act, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

Section 8(c)(21), 33 U.S.C. 908(c)(21), provides:

(21) Other cases: In all other cases in the class of disability, the compensation shall be 66-2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

Section 8(c)(23), 33 U.S.C. 908(c)(23), provides:

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average

weekly wages are determined under section 10(d)(2), the compensation shall be 66-2/3 per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 2(10), payable during the continuance of such impairment.

Section 10(d)(2), 33 U.S.C. 910(d)(2), provides:

(2) Notwithstanding paragraph (1), with respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i)) occurs—

(A) within the first year after the employ has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or

(B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 6(b)) applicable at the time of injury.

Section 10(i), 33 U.S.C. 910(i), provides:

(i) For the purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence

or by reason of medical advise should have been aware, of the relationship between the employment, the disease, and the death or disability.

20 C.F.R. 702.212 provides, in pertinent part:

(a) For other than occupational diseases described in (b), the employee must give notice within thirty (30) days of the date of the injury or death. For this purpose the date of injury or death is:

(1) The day on which a traumatic injury occurs;

(2) The date on which the employee or claimant is or by the exercise of reasonable diligence or by reason of medical advice, should have been aware of a relationship between the injury or death and the employment; or

(3) In the case of claims for loss of hearing, the date the employee receives an audiogram, with the accompanying report which indicates the employee has suffered a loss of hearing that is related to his or her employment. (See § 702.441).

(b) In the case of an occupational disease which does not immediately result in disability or death, notice must be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice, should have been aware, of the relationship between the employment, the disease and the death or disability. For purposes of these occupational diseases, therefore, the notice period does not begin to run until the employee is disabled, or in the case of a retired employee until a permanent impairment exists.

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